

Federal Court



Cour fédérale

Date: 20180810

Docket: IMM-638-18

Citation: 2018 FC 824

Ottawa, Ontario, August 10, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

HAFIZOOL ALI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] In this application Mr. Ali seeks review of the decision of an Immigration Officer [the Officer] denying his application for permanent residence within Canada on humanitarian and compassionate [H&C] grounds. For the reasons that follow, this judicial review is granted as the Officer applied the wrong test to the assessment of Mr. Ali's application.

I. Background

[2] Mr. Ali has been in Canada since 1999 when he arrived as a visitor from Trinidad. His visitor visas expired in November 2000. He subsequently filed a refugee claim which was declared abandoned in 2003.

[3] In 2006 he failed to appear for a pre-removal interview and a warrant was issued for his arrest. In November 2016, Mr. Ali was arrested, and later released on bond. In December 2016, he submitted an H&C claim. His submissions focused on his degree of establishment in Canada and the ongoing treatment he required as a result of injuries sustained in a car accident.

[4] His H&C application was denied.

II. H&C Decision Reviewed

[5] In the H&C decision of December 11, 2017, the Officer notes that Mr. Ali is seeking an exemption from the ordinary in-Canada criteria for permanent residence status on H&C grounds. The Officer states that his establishment in Canada and the injuries suffered in a car accident form the basis of his H&C application. The Officer notes that following the car accident, Mr. Ali lived with his sister. He also notes Mr. Ali's concern that the insurance company will not pay for treatment if he returns to Trinidad. The Officer notes Mr. Ali's community ties, and letters of support.

[6] The Officer did not accept any of these submissions as evidence of establishment. First, he concluded that Mr. Ali's failure to appear for removal in 2006 did not weigh in his favour and did not satisfy his establishment in Canada. Regarding the letters of support, the Officer concluded that the test for H&C relief is not whether he is a "welcome addition, an asset, deserving or worthy of staying in Canada, but whether an applicant's hardship in being removed from Canada to apply from permanent residence from abroad, as is required by the legislation."

[7] The Officer further did not grant significant weight to the length of time Mr. Ali has been in Canada. The Officer concluded that individuals in Canada are afforded social benefits such as schooling which allow persons like Mr. Ali to integrate.

[8] The Officer noted that there was insufficient evidence that Mr. Ali remained in Canada due to circumstances beyond his control. He noted that he has some transferrable skills, and accordingly there was little evidence to show that he could not return to his country successfully, even though there would be some difficulties in reintegration.

[9] The Officer considered the leg fracture he suffered in the car accident, but noted that the Hospital reports indicate that he required follow-up, but no follow up evidence was provided. From which the Officer drew a negative inference. The Officer also noted that the medical system in Trinidad is publicly funded, and there was no evidence that the necessary treatment would not be available in Trinidad.

[10] Finally, the Officer considered Mr. Ali's family of six siblings in Canada. The Officer concluded that the relationship with the siblings was not sufficiently strong such that either party would have difficulty without support. The Officer also noted that Mr. Ali has family in Trinidad, and concluded that he could keep in touch with his Canadian family through the internet.

[11] The Officer denied H&C relief.

III. Issue

[12] While the Applicant raises a number of issues with the Officer's decision, the issue which is dispositive of this application is whether the Officer applied the correct test for H&C relief.

IV. Analysis

A. *Standard of Review*

[13] The standard of review for the Officer's selection of the test for H&C relief is correctness (*Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 27 [*Marshall*]; *Gomez Valenzuela v Canada (Citizenship and Immigration)*, 2016 FC 603 at para 19).

B. *Application of Correct Test*

[14] The Applicant argues that the Officer erred by using the hardship test and by analyzing all aspects of Mr. Ali's H&C application through a hardship lens.

[15] On this, in *Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanhasamy*] at paras 25 and 33, the Court noted that decision makers should not bind themselves to a hardship analysis, and instead should give weight to “all relevant humanitarian and compassionate considerations in a given case.” Hardship is not the threshold for relief.

[16] Here while the Officer states that he conducted a global assessment of all relevant factors, he also states as follows:

I acknowledge the letters of support written on behalf of the applicant and that the applicant is considered a reliable, hard-working, helpful, kind, honest individual who would contribute to and be a good addition to the Canadian community. However, the test in an H&C application is not whether the applicant is a welcome addition, an asset, deserving of staying in Canada, but rather whether an applicant hardship in being removed from Canada to apply to permanent residence from abroad, as is required by the legislation.

[17] By the Officer’s own words, he states that hardship is the test he is applying. In *Marshall*, the Court noted that *Kanhasamy* changed the legal tests used to assess H&C factors. Hardship is not the “determinative or sole factor” to be considered in an H&C analysis (*Cieslak v Canada (Citizenship and Immigration)*, 2018 FC 579 at para 17).

[18] While the Respondent agrees that the language used by the Officer in the above quoted paragraph is “awkward” they submit that the Officer nonetheless went on to apply the correct test. However a consideration of the Officer’s analysis does not support this. For example, in considering the medical evidence, the Officer seems to accept the medical evidence that Mr. Ali requires medical treatment, however he then discounts the diagnosis because Mr. Ali failed to demonstrate follow-up. This sort of line of analysis was explicitly rejected in *Kanhasamy*.

[19] Further the Officer went on to discount medical evidence because the Applicant could receive treatment in Trinidad. In *Marshall*, at para 39 the Court rejected this sort of analysis, calling it a “hardship-centric analysis.”

[20] The Respondent argues that the Officer was considering the test in the context of *Irimie v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16640 [*Irimie*]. There, the Court stated that the test for H&C relief is not whether a person would be a welcome addition to Canada. However, *Irimie* was pre-*Kanhasamy*, and involved an analysis of the previous hardship test. To the extent the Officer relied on this test, he was wrong to do so.

[21] Here the Officer failed to apply the correct test for H&C relief, and in turn, filtered a number of Mr. Ali’s otherwise positive factors through a hardship lens. This judicial review is therefore allowed.

JUDGMENT in IMM-638-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Officer is set aside and the matter is remitted for redetermination by a different officer; and
2. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-638-18

STYLE OF CAUSE: HAFIZOOL ALI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 24, 2018

JUDGMENT AND REASONS: MCDONALD J.

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